United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7093

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

DEVLIN ADAMS, by ROSSINI ADAMS, his parent and natural guardian,

Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,

Defendant.

- x

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Introduction

No reply to appellee's brief is necessary regarding plaintiff's argument that he was living with and supported by his father at the time of the latter's death, for, as to that point, defendant has merely set out the facts, the law, and the conclusions of the distinct judge, Brief for the Appellee, pp. 4-12. Nothing was there said by defendant in support of the lower court's opinion and while plaintiff can only guess at defendant's reasons for adopting that posture it may be related to the lower court's departure from all relevant precedent.

As to the constitutional point, however, further argument is necessitated by recent developments in the law as well as by defendant's treatment of the issue.

A. The Social Security Benefits At Issue Here Are Intended to Replace the Legal Right to Support, Not Actual Support.

Vital to the government's defense is its position that the benefits at issue are intended to replace only support actually received (Brief for the Appellee, pp. 26-27), not support to which claimaint was legally entitled. Were the latter the intent the discrimination against illegitimates imposed by the living with and support requirements would perforce be irrational because a father is obligated to support all of his children. The primary authority for appellee's position is the decision on remand in Norton v. Weinberger, C. No. 72-271-B (D. Md. Filed Feb. 28, 1975), Slip.Op. pp. 7-8. Plaintiff has already argued that Jimenez v. Weinberger, 417 U.S. 628 (1974) and the relevant legislative history

require a different result (Brief for Plaintiff-Appellant, pp. 29-32). Here we would note that Norton's contrary determination on remand rests on only two points: first, if the Supreme Court in Jimenez wished to adopt the right to support approach it would have done so "more directly," Slip. Op., p. 8, and second, the complex language of the Act itself would have been unnecessary had that been the Congressional intent, Id.

Neither of these arguments stands the scrutiny to which they were subjected by the dissenter in Norton (Winter, Circuit Judge). He disposes of the majority's latter point - really a makeweight - by referring to the tortured history of the Act and its many amendments which just as reasonably account for the surplus verbiage (Dissent, p. 11, f. n. 13). Other evidence of Congressional intent argues more strongly for the right to support approach (see Id. p. 4.)

As to the majority's claim that Jimenez did not "directly" deal with the issue one must say, with appropriate deference, that it is flatly wrong. See the language from Jimenez quoted by Judge Winter at p. 5, f.n. 5 of his dissent.* He also points out that the major thrust of Jimenez is in the same direction, Id. pp. 9-12.

The other post-Jimenez decision on the constitutional issue presented here is Lucas v. Secretary of H.E.W., C.A. 4845 (D.R.I. Feb. 25, 1975). Ruling in favor of the claimant on constitutional grounds, the court implicitly accepted the thesis that the benefits were intended to replace a right to support, Id., Slip.Op. p. 33,

* "Under [the Secretary's] view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability; ... We do not read the statute as supporting that view of its purpose." Jimenez, supra, 417 U.S. at 634

f.n. 11.** --

B. Even if the Social Security Act Is Read To Provide Benefits Only To Those Actually Dependent On a Deceased It Is Unconstitutional.

Defendant admits that if only those actually dependent are the intended beneficiaries the statute is "over inclusive in that some of the legitimates, and some of the illegitimates, who are presumed to be dependent may in fact not be dependent upon their father." Brief for the Appellee, p. 23. This admission should alone undo defendant.

In Lucas v. Secretary of H.E.W., supra, the court held that the overinclusiveness of the statute refuted the argument that the living with and support requirements are necessary to prevent spurious claims, Id., Slip. Op., p. 23. See also Brief for Plaintiff Appellant, pp. 33-37.

Defendant here argues nonetheless that those requirements are rational and rests his argument on three pillars: common experience, statistical data, and precedent, Brief for the Appellee, pp. 21-23. None of these is sound.

The reference to "[e]xperience alone," Id., p. 23, is striking not for the support it lends defendant but rather for the light it sheds on the kind of thinking that underlies the statute itself: The falling back on "common sense" which incorporates the traditional, albeit unconscious, prejudice against the illegitimate. Chief Judge Pettine in Lucas, supra, reached the same conclusion. Plaintiffs can put it no more persuasively than he did:

** The Lucas opinion indicates that the government's position on this issue has shifted, i.e. they argued there that the statute intended to replace a right to support! Slip. Op., pp. 23-24. This shift would appear to cut much of the ground from under the government's present position.

> "Thus, once again we are confronted with a legislative enactment which visits 'society's condemnation of irresponsible liasons beyond the bonds of marriage 'on the head of the child who is in no way responsible for the circumstances of his birth... The statutory scheme... conditions eligibility on the basis of Congress' views as to who is entitled to support and reflects society's view that legitimate and 'legitimated' children are more entitled to support by or through a parent than are illegitimate children." Lucas v. Secretary of H.E.W., supra, Slip. Op. p. 24.

Insofar as defendant purports to bolster his negative view of illegitimates by reference to statistics he can merely tell us that illegitimacy is increasing, Brief for the Appellee, p. 21, f.n. 12. If they are relevant at all such statistics argue for more even handed treatment of this growing population. More to the point are the statistics which cast doubt on the notion - so important to defendant - that illegitimates are less likely than other children to actually receive support from their parents. These statistics are persuasive in part because Congress only this year relied upon them in amending the ADC provisions of the Social Security Act in order to deal with welfare dependency caused by the abandoning parent, 42 U.S.C. §451 et seq, as amended by Pub. L. 93-647, 88 Stat. 2337, 93rd Cong. 2nd Sess.(Social Service Amendments of 1974, Part B - Child Support Programs) (Approved, Jan. 4, 1975).

In enacting the amendments Congress was motivated by a finding that the "problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents." Sen. Rep. 93-1356, 93rd Cong., 2nd Sess., Dec. 14, 1974,1975 U.S. Code Cong. Admin. News at 9205. Especially important here is the Senate Report's view that abandonment of legitimate

children results in more cases of dependency than non-support of the illegitimate! The Report finds that in 46.5 percent of the AFDC families the father was divorced or separated from the family. Comparatively, in but 33.7 percent of the families were the parents unmarried. Id at 9206. (Of course the Committee also recognized the seriousness of out of wedlock births in the growing dependency statistics, Id. at 9206, 9214-9217). Had Congress relied on "experience alone" it might have reached an entirely different understanding of the problem.

The third footingon which defendant places the statute's rationality, precedent, is no more solid than the others. With a single exception, every case cited by him for the proposition that illegitimates are less likely to have received paternal support resulted in a ruling for the out-of-wedlock plaintiff.* Hence those statements are mere dicta and should not be persuasive here. The sole exception is Norton v. Weinberger, supra, which on remand did not present any arguments in support of rationality but merely asserted that the statute was, if you will, rational enough, Norton, supra, Slip. Op. p. 10, f.n.5.

For at least two reasons the Norton finding of rationality is unpersuasive. Crucial to its decision was the court's understanding of a collateral aspect of the statute, the status of illegitimates entitled to inherit under state law (42 U.S.C. §§402(d)(1) 402(d)(3), 416(h)(2)(a)). Norton holds that this group must also meet the living with or support requirements. See Norton, supra, Slip. Op. pp. 12-16. Yet, to maintain this position it must overlook

* See cases collected at Brief for the Appellee, pp. 21-22

the Supreme Court's view of the matter as expressed in Jimenez, supra, at 417 U.S. 628, n.2 at 631, 635-636. The Norton majority here also strains the language of the statute itself, see the dissenting opinion of Judge Winter at Norton, supra, Slip. Op. p. 2, f.n.1. In any event, the majority's approach has been rejected in this circuit in Frost v. Weinberger, ____F.2d____, 74-2020 (2nd Cir., April 17, 1975), a case dealing with related procedural problems. In describing the substance of the statute the court said:

> "Prior to 1965 the only children eligible for benefits pursuant to 42 U.S.C. §§402 (d)(1) and (2) were children who could inherit from the decedent pursuant to applicable state law..."
> Id., Slip. Op., p. 2921

If the Norton majority erred on this point, it was a fatal error, because there is no way relevant here in which children who could inherit/from those who could not. (Plaintiff has already argued may be distinguished the lack of rationality inherent in treating different classes of illegitimates differently when both classes stand in the same shoes for all relevant purposes, Brief for Plaintiff-Appellant, pp. 33-34.)

A second major error in the Norton decision on remand concerns the standard the court used to test the statute. Specifically, once it found that the act was rational it should have gone on to determine whether the discrimination against the plaintiff's class of illegitimates was supported by a compelling governmental interest. The appropriate standard of review in illegitimacy cases has been much discussed, but the arguments in support of, and the precedents favoring, the treatment of illegitimates as a "suspect" class has

seldom been better summarized than by Chief Judge Pettine in Lucas v. Secretary of H.E.W., supra, Slip. Op., pp. 14-21. On the basis of that discussion plaintiff urges this Court to reach a similar conclusion should it initially find the statutory scheme to be rational. For all the reasons already discussed this Court should find for plaintiff on the basis of the harsher test, if on no other ground.

Conclusion

wherefore, the judgment below should be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

John C. Gray, Jr. being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 159 Borgen St. Brooklyn, N.Y.

That on the 1st day of May, 1975, deponent served ~~the within~~ two copies of the within reply brief for plaintiff-appellant on each addressee listed below, being the address designated by said attorney for that purpose, by depositing ~~a~~ true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within New York State, addressed to:

David G. Trager
United States Attorney
225 Cadman Plaza East
Brooklyn, N.Y. 11201

John C. Gray Jr.

Sworn to before me this
1st day of May, 1975

Stephen Dobkin

NOTARY PUBLIC

STEPHEN DOBKIN
Notary Public, State of New York
No. 24-6050725
Qualified in Kings County
Commission Expires March 30, 1976